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In the Supreme Court of the United States

October Term, 1961

JOSEPH SHERMAN, PETITIONER

v.

JAMES A. HAMILTON, JR., DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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No. 650

JOSEPH SHERMAN, PETITIONER

v.

JAMES A. HAMILTON, JR., DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (R. 25-35; Pet. App. 10-20) is reported at 295 F. 2d 516. The opinion of the district court (R. 15-18) is reported at 194 F. Supp. 805.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1961 (R. 35). The petition for a writ of certiorari was filed on January 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 235(a) of the Immigration and Nationality Act of 1952 empowers an immigration officer to subpoena an alien as a witness in an administrative investigation conducted to determine whether to institute deportation proceedings against him.

STATUTE INVOLVED

Section 235(a) of the Immigration and Nationality Act of 1952, 66 Stat. 198, provides in pertinent part:

> * * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpoena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books,

papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

STATEMENT

In connection with the investigation of petitioner, an admitted alien, to determine his deportability, the District Director of the Immigration and Naturalization Service at Boston, Massachusetts, caused a subpoena to be served upon him under Section 235(a) of the Immigration and Nationality Act of 1952, *supra*, commanding that he appear on April 18, 1961 at the office of the Service in Boston "to give testimony in connection with deportation proceeding . . . relating to Joseph Sherman concerning his privilege of entering, reentering, residing in, or passing through the United States" (R. 5, 6).

On the date and at the place specified, petitioner appeared before Immigration and Naturalization Investigator Kinnevan and, after being again advised of the purpose of the inquiry, was sworn as a witness (R. 8). Petitioner responded to the investigator's preliminary inquiries—giving his name, his residence, and date of birth (R. 8). He further testified that he had been born in Poland, that he first entered the United States in 1920, that he had never become a citizen of the United States, and that he had registered and reported annually pursuant to the Alien Registration Act of 1940 (R. 8-9). There followed a series of inquiries, which petitioner refused to answer, relating to the issue whether, in June 1937,

he had departed from the United States and traveled to Spain with a passport obtained under an assumed name (Samuel Levine), and, while still employing this pseudonym, had reentered the United States, in 1938, without proper travel and reentry documents (R. 9-14).[1] Petitioner's refusal to respond to these questions was posited "on all the grounds" available to him.[2] The proceeding was then terminated.

On April 24, 1961, the District Director filed an application with the district court to enforce the administrative subpoena. Following a hearing, the court granted the application ordering petitioner to appear and testify before the investigator and answer all the questions that had been put to him on April 18, as well as such "further questions as may be material to the subject matter of the investigation being conducted" (R. 19; see R. 15-18). The court of appeals unanimously affirmed (R. 25-35; Pet. App. 10-20), holding that a subpoena could be issued to an alien whose deportability was the subject of investigation. The court interpreted the order of the district court as not passing on the issue whether petitioner could claim the privilege against self-incrimination

[1] The files of the Immigration and Naturalization Service contained this information as well as the sworn testimony of a witness to the effect that the person who in 1937 executed a passport application in the name of Samuel Levine was actually the petitioner (R. 6; see R. 11).

[2] Initially he refused to answer "on advice of counsel." When he was thereafter asked by the investigator whether he also relied "on the grounds of the Fifth Amendment," petitioner answered: "Not necessarily. On all the grounds that are available to me." (R. 9.)

but deciding only the right to subpoena the alien under investigation (R. 33-34; Pet. App. 18-19).

ARGUMENT

Section 235(a) of the Immigration and Nationality Act of 1952, *supra*, pp. 2-3, grants to immigration officers the right to compel by subpoena the attendance and testimony of witnesses "relating to the privilege of any person to enter, reenter, reside in, or pass through the United States." The sole question presented by this case is whether this subpoena power extends to an alien, like petitioner, whose deportability is the subject of investigation.[1] The ruling of the courts below that it does is supported by the language, history and purpose of the statute.

1. The language of Section 235(a) literally covers petitioner since he is a "person" and the testimony sought from him relates to the "privilege of any person"—the privilege of petitioner, an alien—to reside here. The language involved is not new in the 1952 Act. Section 16 of the Immigration Act of 1917, 39 Stat. 885, had conferred on immigration authorities power to subpoena any witness "touching the right of any alien to enter, reenter, reside in, or pass through the United States."[2] Under this predecessor statute, the term witness had been construed by the

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[1] Petitioner does not argue, and the case, in its present posture, does not raise any issue concerning petitioner's right to invoke his privilege against self-incrimination at the administrative inquiry (see the Statement, *supra*, pp. 4-5).

[2] The only change of relevance for present purposes was that the 1952 Act substituted the word "person" for "alien."

courts as embracing, within the subpoena power, an alien, like petitioner, who was the subject of a deportation investigation. *Graham* v. *United States*, 99 F. 2d 746, 748-749 (C.A. 9); *Loufakis* v. *United States*, 81 F. 2d 966 (C.A. 3). There is no reason to believe that, when Congress, in 1952, readopted essentially the language of Section 16 of the 1917 Act, it intended to change the judicial construction previously put on that language. See, *e.g.*, *Shapiro* v. *United States*, 335 U.S. 1, 16, and cases there cited.

2. *United States* v. *Minker*, 350 U.S. 179, is distinguishable. From 1917 to 1952, the subpoena power of immigration officers was limited to witnesses in an administrative investigation conducted to determine whether to institute deportation proceedings against an alien. In some instances, the alien himself, who was the subject of the investigation, was subpoenaed as a witness. As noted, this reading of the statute had been upheld by the courts. In 1952, Congress, by adding new language to Section 235(a), expanded the power of immigration officers to subpoena witnesses in "any manner which is material to the enforcement of this Act and the administration of the Service." The question in *Minker* was whether the subpoena power was to be extended to a citizen who was himself the subject of an investigation conducted to determine whether to institute a judicial denaturalization proceeding against him (see 350 U.S. at 181). This Court's "restrictive reading of the Janus-faced word 'witness'" (*id.* at 187) stemmed from its reluctance to permit administrative subpoena power to be applied to a prospective defendant

in a suit for the revocation of citizenship, absent a clear legislative command to that effect. The Court pointed out that denaturalization proceedings had theretofore been litigated only in a "public adversary judicial proceeding" subject to a heavy burden of proof (*id.* at 188), and reasoned that, had Congress intended such a radical departure from existing procedure, it would have done so specifically and directly and not simply by an "ambiguously worded power" (*id.* at 187). As the Court stressed, "where there is doubt it must be resolved in the citizen's favor" (*id.* at 188). Justice Black, in a concurring opinion, also avowed that Section 235(a) was concerned with "aliens and immigration, not with naturalization or denaturalization," for, although "Congress has full power to bar or exclude aliens from the country * * *, citizenship, whether acquired by birth or by naturalization, cannot be taken away without a judicial trial in which the Government carries a heavy burden" (*id.* at 193). And Justice Douglas, in another concurring opinion, agreed that Section 235(a) should be construed narrowly with respect to denaturalization proceedings, because a citizen's constitutional "safeguards would be imperiled if prior to the institution of the proceedings the citizen could be compelled to be a witness against himself and furnish out of his own mouth the evidence used to denaturalize him" (*id.* at 197).

None of the considerations on which *Minker* rests apply to the present case. The language here is not new or ambiguous; the procedure for investigating the right of aliens to remain had previously been

held to apply to an alien under investigation; the subpoena power is being applied, not to a judicial proceeding, but to matters which have always been primarily subject to administrative adjudication. The power over deportation has long been recognized as delegable by Congress to executive or administrative authority, and the rights of aliens have been and still are primarily the subject of administrative scrutiny and regulation. See, *e.g.*, *United States* v. *Ju Toy*, 198 U.S. 253, 260-261; *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210. Congress hardly intended to deprive the Service of the right, for example, to summon a sailor to determine whether he had overstayed shore leave, or a student to determine whether he was maintaining his status, without examining third parties in each case. Even with respect to persons under investigation, administrative subpoena power or other process to aid administrative adjudication, is not new either in immigration law or in other fields of administrative law. Cf. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208. There is, thus, no reason why the subpoena power granted by Section 235(a) should not apply to petitioner who is admittedly an alien and whose right to remain is under investigation.

In *Lee Tin Mow* v. *Jones*, 268 F. 2d 376 (C.A. 9), relied on by petitioner (Pet. 5-6), although the subpoena purported to issue in an investigation of the alien preliminary to the institution of a deportation proceeding against him, the defendant at all times claimed he was a citizen. The subpoena did not recite that he was even suspected of being an alien, and many of the questions he refused to answer were directed to his citizenship status (see 268 F. 2d at 379).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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